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The Game's the Thing: Property, Priorities and Perceptions in the Video Games Industries

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I. INTRODUCTION

The status of (video) games in copyright law remains the subject of debate. Whether it be long-standing issues of whether to treat games as software, audiovisual works or both, or newer issues such as the impact of casual gaming and the app market, there are recurring issues of the 'fit' between copyright law and games. Moreover, a range of recent decisions of the Court of Justice of the European Union ('CJEU') demonstrate the impact of the resolution of some of these theoretical issues for the balance of power between developers, manufacturers and users (players).

As part of a UK-based project on games, transmedia and the law,¹ we² reviewed legislation and cases (in the UK, supplemented by material from the US and Commonwealth), considered critical perspectives on the current law, met with developers³ and carried out a survey of gamers. In this chapter, I will outline, drawn from this evidence, three models of copyright for games: the general model, the game-specific model, and the player rights model. None of these models are ideal but they can be used to identify the strengths and weaknesses of different facets of the laws applicable in the sector, and to pick up Boyden's important challenge (in his 2011 article 'Games and Other Uncopyrightable Systems'⁴) to attend to the problems of games (including video games) for broader reasons:

[G]ames exist at the boundary of intellectual property law. Focusing on the precise nature of games — and why they are not within the scope of copyright — helps us define where those boundaries are . . .⁵

First, though, the general legal framework for copyright protection in respect of video games will be set out (Part II), followed by a review of critical perspectives and the evidence gathered for this project (Parts III and IV).

II. THE FRAMEWORK FOR COPYRIGHT AND GAMES

A. General principles and conceptual issues

European Union copyright law operates through a number of Directives. These measures are transposed into the national law of member states according to their own legal

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² The author (as principal investigator), with Dr Keith M Johnston and Dr Tom Phillips.

³ The aspects of the workshop with developers relevant to this article are discussed in more detail in Tom Phillips, "'Don't Clone My Indie Game, Bro': Informal Cultures of Videogame Regulation in the Independent Sector' (2015) 24(2) Cultural Trends 143.

⁴ Bruce Boyden, 'Games and Other Uncopyrightable Systems' (2011) 18 George Mason Law Review 439.

⁵ *ibid* 441.

systems, but are binding as to the outcome — thus ‘harmonising’ the law in part. EU members are also parties to the World Intellectual Property Organization (‘WIPO’) treaties on copyright law, and the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (‘TRIPS’).⁶

However, in the case of games, there are three particular areas where the application of the broad principles of contemporary copyright law requires further discussion. These questions relate to the Software Directive,⁷ the definition of works protected by copyright law, and the interaction between copyright law and contract law.

The first two questions are closely connected. There are two relevant regimes in the EU. One operates at a general level — the Information Society Directive⁸ and, broadly, prior member state provisions including those adopted in the context of Berne and TRIPS.⁹ The other deals specifically with computer programs, again reflecting international instruments — the Software Directive¹⁰ — and requires the protection of computer programs as literary works, subject to some specific provisions and exceptions. In some jurisdictions, often following the lead of the US, computer programs are a type of literary work but are not treated in as distinctive a fashion (although some differences can still be detected with regard to exceptions).¹¹ The application of the two Directives to the video games sector has long been a source of curiosity. This takes place in the context of well-recognised ‘inconsistencies and uncertainties’¹² between the Directives.

The second question arises because ‘games’ are not mentioned in the international treaties. As a result, protection will depend on the treatment of a game as a *type* of protected work (eg, film, literary) and/or of *components* of a game as a protected work (eg, artistic).

A 2013 report for WIPO found that there were two dominant approaches to the copyright status of video games: as predominantly computer programs (a type of literary work under the international treaties, as discussed above) or as mixed works.¹³ The latter often includes games as a type of film,¹⁴ as has been the case to some extent in Australia¹⁵ and potentially in New Zealand,¹⁶ although sometimes this has been held to offer protection

⁶ See Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Marrakesh, 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 321 (1999), 1869 UNTS 299, 33 ILM 1197 (1994), entered into force 1 January 1995.

⁷ Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16 (codifying Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs) (‘Software Directive’).

⁸ Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (‘Information Society Directive’).

⁹ Berne Convention for the Protection of Literary and Artistic Works of September 9 1886 (Paris, 4 May 1896), 828 UNTS 221, entered into force 5 December 1887, as revised at Stockholm on 14 July 1967; TRIPS (n 6).

¹⁰ Software Directive (n 7).

¹¹ John S McKeown, *Canadian Intellectual Property Law and Strategy* (Oxford University Press 2010) 186, 301 (discussing Copyright Act (Canada), RSC 1985, c C-42, s 30.6; Benedict Atkinson, *The True History of Copyright: The Australian Experience 1905–2005* (Sydney University Press 2007) 381 (discussing the significance of statutory changes regarding software in Australian law in 1984, closely following the position in US law).

¹² Marie-Christine Janssens, ‘The Software Directive’ in Irini A Stamatoudi and Paul Torremans (eds), *EU Copyright Law: A Commentary* (Edward Elgar 2014) [5.03].

¹³ Andy Ramos and others, *The Legal Status of Video Games: Comparative Analysis in National Approaches* (World Intellectual Property Organisation 2013) [14].

¹⁴ Paul Gottlich, ‘Online Games From the Standpoint of Media and Copyright Law’ (2007) 6 IRIS Plus 58–9.

¹⁵ *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 75 FCR 8; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 [80–100].

¹⁶ Susy Frankel, *Intellectual Property in New Zealand* (LexisNexis 2011) 791 (arguing that *Galaxy* (n 15) was an interpretation of an Australian provision that was narrower in scope than its New Zealand equivalent).

only to video-style material ('attract mode' in arcade terms,¹⁷ or cutscenes in contemporary games). In any event, protection of film in the UK is based on copying a recording and not 'reshooting',¹⁸ and is therefore of limited value in some situations (especially non-literal copying, as discussed below). Arguments to use the law on dramatic works are also encountered, but these have problems in the requirement for unity.¹⁹ In some countries, video games are treated as audiovisual works. This was a particular feature of a line of disputes regarding arcade games under US law in the 1980s, although typically this was in addition to rather than instead of the protection of software.²⁰

The CJEU recently addressed the status of games in its decision in *Nintendo Co Ltd v PC Box Srl*,²¹ a preliminary reference regarding the law on technological protection measures ('TPMs'). In order to ascertain whether the provisions of the Information Society Directive or Software Directive were applicable, the court found it necessary to define games in more detail. It found that games 'constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption'.²² Consequently, when graphics and sounds are part of the originality of a game, 'they are protected, together with the entire work, by copyright in the context of the system established by [the Information Society Directive]'.²³ This was a surprising finding, especially in light of the CJEU's recognition of the specialised nature of software copyright in *UsedSoft GmbH v Oracle International Corp*.²⁴ Nonetheless, the significance of other creative works (eg, licensed or newly composed music) within games has been highlighted in leading accounts of the industry,²⁵ including the degree to which technological developments (eg, the development of the Sony PlayStation) has underlined the importance of music, art and multi-disciplinary creative teams.

A third issue is that some alleged infringements of copyright law in respect of games may be better understood as breaches of contract. This point is underdeveloped in Europe.²⁶

¹⁷ Stanley Lai, *The Copyright Protection of Computer Software in the United Kingdom* (Hart Publishing 2000) 89.

¹⁸ Simon Stokes, *Art and Copyright* (2nd edn, Hart Publishing 2012) 180; *Norowzian v Arks* [1998] FSR 394 (Ch).

¹⁹ David Booton and Angus MacCulloch, 'Liability for the Circumvention of Technological Protection Measures Applied to Videogames: Lessons From the United Kingdom's Experience' (2012) 3 *Journal of Business Law* 165, 176.

²⁰ For instance, the registration of *Scramble* as an audiovisual work (and not as a computer program) was unsuccessfully challenged on the grounds that fixation was not present and that the deposited videotape was only applicable to that version: see *Stern Electronics, Inc v Kaufman*, 669 F 2d 852 (2d Cir 1982). Another unsuccessful argument was that failure to register a program defeated a claim; the court responded that the game (*Asteroids*) was copyrightable as an audiovisual work and as a motion picture, with the circuit board (program) being the medium of fixation: see *Atari, Inc v Amusement World, Inc*, 547 F Supp 222 (D Md 1981). In cases from the same era (*Williams Electronics, Inc v Artic International, Inc*, 685 F 2d 870 (3d Cir 1982); *Midway Manufacturing Co v Strohon*, 564 F Supp 741 (ND Ill 1983)), it was clear that developers were pursuing a dual strategy of registering both the audiovisual work (in the case of *Williams*, two works — one for attract mode and one for play mode) and the program. In both cases literal copying of code was found, which on the facts would have had limited relevance to a claim of infringement focused on the audiovisual work alone.

²¹ Case C-355/12 *Nintendo Co Ltd v PC Box Srl* [2014] OJ C93/8.

²² *ibid* [23].

²³ *ibid*.

²⁴ Case C-128/11 *UsedSoft GmbH v Oracle International Corp* [2012] OJ C287/10.

²⁵ James Newman, *Videogames* (2nd edn, Routledge 2013) 33; Randy Nichols, *The Video Game Business* (British Film Institute 2014) 128–30.

²⁶ It has been suggested that the Unfair Contract Terms Directive will often apply (in respect of consumers and mass-market licences), and that EU copyright law recognises the role of contracts through the (so far limited) provisions regarding the inapplicability of certain contractual provisions purporting to exclude user rights in the

The *MDY Industries v Blizzard Entertainment, Inc* decision in the US²⁷ (on the legal status of Glider in World of Warcraft) holds that certain infringements are actionable as a breach of contract rather than a breach of copyright. This is important because — for example — it affects the remedies available and who can be taken to court.

These conceptual issues affect the treatment of three specific issues: second-hand sales, digital rights management and ‘cloning’.

B. Second-hand sales

The *UsedSoft* decision of the CJEU²⁸ clarifies that the ‘exhaustion’ right in copyright law (in short, that a purchaser can resell without recourse to the original vendor) applies to downloaded software — including in some circumstances where the software has ostensibly been licensed rather than sold.²⁹ However, both the doctrinal approach in *PC Box* and a recent German decision point towards some doubts on the applicability or effectiveness of the *UsedSoft* decision in relation to games, and specifically game business models;³⁰ the limited relevance of exhaustion in the digital context under the Information Society Directive, as held in *Allposters*³¹, is also a limitation. Nonetheless, the broad principles appear to have survived low-level challenges and are beginning to be reflected in business practices in parts of the software industry,³² and there have also been cases instigated by resellers seeking (successfully in some situations) the annulment of clauses in software licensing agreements on *UsedSoft* and unfair competition grounds.³³ The issue has also been controversial in the United States, where the application of the long-standing ‘first sale’ doctrine³⁴ to new technologies has prompted discussion.³⁵

C. DRM

Console manufacturers have brought a number of civil actions under UK law in respect of ‘modchipping’ and supported a smaller number of criminal prosecutions. These actions have been based on the transposed provisions of both the Software Directive and the Information Society Directive, which protect TPMs, including ‘digital rights management’ (‘DRM’).

Software Directive and Database Directive: Lucie Guibault, ‘Relationship between copyright and contract law’ in Estelle Derlaye (ed), *Research handbook on the future of EU copyright* (Edward Elgar 2009) 528, 535.

²⁷ 629 F 3d 928 (9th Cir 2010).

²⁸ *UsedSoft* (n 24).

²⁹ See generally Andrew Nicholson, ‘Old Habits Die Hard?: *UsedSoft v Oracle*’ (2013) 10(3) SCRIPTed 389 (on the decision and its implications); Reto Hilty, ‘“Exhaustion” in the Digital Age’ (2015) Max Planck Institute for Innovation & Competition Research Paper 15-09 <<http://ssrn.com/abstract=2689518>> accessed 2 January 2016 (on the background to and context of the question of exhaustion, and the application of the decision to various formats).

³⁰ Martina Gillen, ‘DRM and Modchips: Time for the Court of Justice to do the “Right” Thing’ (2014) 11(3) SCRIPTed 229; Maša Savič, ‘The Legality of Resale of Digital Content After *UsedSoft* in Subsequent German and CJEU Case Law’ (2015) 37(7) European Intellectual Property Review 414, 419.

³¹ Case C-419/13 *Art & Allposters International v Stichting Pictoright* [2015] OJ C107/6. The issue arises because of the reference to an ‘object’ in the Information Society Directive, as compared with ‘copy’ in the Software Directive.

³² Robin Fry, ‘Reselling Software Licences’ (2015) 26 Computers & Law 19.

³³ Savič (n 30) 417.

³⁴ *Bobbs-Merill v Straus* 201 US 339 (1908); Copyright Act 1976 (US), s 109(a).

³⁵ Gregory Steirer, ‘The personal media collection in an era of connected viewing’ in Jennifer Holt and Kevin Sanson (eds), *Connected viewing: selling, streaming, & sharing media in the digital era* (Taylor & Francis 2014).

The distinction between the Directives (see Part II(A) above) is important for a number of reasons. In the UK and elsewhere, criminal sanctions are in place for non-software cases. There is also a different burden of proof in the Directives; compare the requirement that a device be ‘primarily designed’ for the purpose of circumvention under the Information Society Directive³⁶ with the Software Directive’s reference to ‘sole intended purpose’.³⁷ Further exceptions are also in place under the Software Directive, in relation to reverse engineering, backup, and interoperability. Moreover, it is provided that the right to load and run a program (which would under the Directive be considered as within the exclusive rights of the author) may neither be prohibited by contract nor require specific authorisation, in respect of lawful use. In practice, console manufacturers have successfully emphasised the artistic elements of games (for example, specific works of art in the form of game graphics) in order to secure favourable decisions under the Information Society Directive.

PC Box, already discussed in this chapter,³⁸ was the first CJEU decision on DRM. In responding to the Italian Court’s preliminary reference, the CJEU specifically referred to proportionality as a limitation on the protection of the rights holder. Indeed, EU law will only protect TPMs against circumvention where the objective is to prevent infringing acts³⁹ and where the circumvention device does not have a commercially significant other use.⁴⁰ It seeks evidence of actual use of a device in breach of copyright (potentially a difficult issue)⁴¹ and requires consideration of the effectiveness of measures and the relative costs of different forms of protection (including less intrusive means). This calls into question earlier English decisions — for example, the finding in *Nintendo Co Ltd v Playables Ltd* that the cause of action is a tort of strict liability⁴² and that protection does not have to be totally effective.⁴³

However, in the specific case of the defendants *PC Box*, it appears as if the Italian Court still found in Nintendo’s favour because of the evidence presented on use and proportionality.⁴⁴ Nintendo’s predictably ‘delighted’⁴⁵ response links the Italian finding to decisions elsewhere (including the UK),⁴⁶ but the space opened up by the CJEU for a more detailed consideration of use and proportionality casts some doubt on Nintendo’s confidence, given that the earlier decisions applied demonstrably less intensive tests. Favale argued (shortly after the CJEU had spoken) that some of the emerging requirements for making TPMs enforceable under EU law (ie, that there not be a less intrusive way to achieve protection, and that infringement be demonstrated) are ‘so difficult to prove that this might disrupt the implementation of DRM in practice (to the joy of users’ rights organisations)’.⁴⁷ However, she also criticises how the court has approached the topic of user rights.

D. Cloning

³⁶ Information Society Directive (n 8) art 6.

³⁷ Software Directive (n 7) art 7. See discussion in Jon Bing, ‘Copyright protection of computer programs’ in Estelle Derclaye (ed), *Research handbook on the future of EU copyright* (Edward Elgar 2009) 424.

³⁸ *PC Box* (n 21).

³⁹ *ibid* [31].

⁴⁰ *ibid* [30].

⁴¹ Gareth Dickson, ‘Game Over for Excessive TPM?’ (2014) 24 *Computers & Law* 5, 7.

⁴² [2010] EWHC 1932, [2010] FSR 36 [19] (based on *Sony v Ball* [2004] EWHC 1738 (Ch)).

⁴³ *Playables* (n 42) [17].

⁴⁴ Mark Walton, ‘Nintendo Wins Court Ruling Against Modchips and Homebrew Software’ (*Ars Technica UK*, 17 November 2015) <<http://arstechnica.co.uk/gaming/2015/11/italian-court-rules-modchips-are-primarily-used-to-play-pirated-games/>> accessed 5 January 2016.

⁴⁵ Nintendo, ‘Nintendo Wins Important Court Ruling to Protect the Security in Its Consoles’ (2015) <https://ap.nintendo.com/_pdf/news/283613675.pdf> accessed 5 January 2016.

⁴⁶ *ibid*.

⁴⁷ Marcella Favale, ‘A Wii Too Stretched? The ECJ Extends to Game Consoles the Protection of DRM — on Tough Conditions’ (2015) 37(2) *European Intellectual Property Review* 101, 106.

In our project, we approached cloning as being ‘the intentional copying of sets of game mechanics, with slight alterations to art and design in order to capitalise on a previous games’ success’.⁴⁸ The term has become particularly visible in discussion of online and casual games in recent years. Given that platforms such as app stores have ‘discoverability’ as a concern,⁴⁹ and the cost of developing casual games is argued to be potentially much lower than conventionally understood in the sector,⁵⁰ the ease with which clones can draw users (and money) away from successful games (even for a short period) prompts debate.

The issue of what courts called ‘knock-offs’ emerged in US courts during the arcade games boom of the 1980s⁵¹ and became a significant part of the sector quite rapidly.⁵² In a series of cases, developers of successful games repeatedly brought claims of infringement against other developers. These cases required courts to develop copyright law doctrines — in particular the idea/expression dichotomy — and to apply them to the arcade games sector. In *Atari, Inc v North American Philips Consumer Electronics Corp*,⁵³ the defendant (manufacturer of the Magnavox Odyssey) prevailed on a range of arguments regarding the lack of protection for various aspects of Atari’s Pac-Man (ranging from the score table to the exits and dots), but was still found to have infringed in particular aspects — essentially the ‘characters’ (gobblers) appearing in both games. Conversely, the two US copyright concepts of merger and scènes à faire were significant to a finding of no infringement in a dispute over two similar karate games;⁵⁴ the use of dissimilar backgrounds and the dual constraints of the nature of karate and the limitations of contemporary computers supported the arguments of the defendants.

The leading English authority on this topic is more recent, although still concerns arcade games. In *Nova Productions Ltd v Mazooma Games Ltd*,⁵⁵ a game similar to one already on the market was found not to breach the copyright of the developer of the earlier game. The court found that no code had been copied and the similarity was essentially one of gameplay or the game mechanics. The court seems to close the door to protecting gameplay.

Nova (creator of the game *Pocket Money*) alleged Mazooma (creator of *Jackpot Pool*) and Bell Fruit (creator of *Trick Shot*) infringed copyright. Similarities included the cue and power meter. The court drew out a precedent in *Navitaire, Inc v EasyJet Airline Co* (regarding the development of similarly functioning new booking software without access to code)⁵⁶ and applied it to games. Lord Justice Jacobs said that finding infringement would mean ‘copyright would become an instrument of oppression rather than the incentive for creation which it is intended to be’.⁵⁷ This is consistent with and similar in rhetorical terms to

⁴⁸ Phillips (n 3).

⁴⁹ Newman (n 25) 35.

⁵⁰ Claudio Feijó, ‘An Exploration of the Mobile Gaming Ecosystem From Developers’ Perspective’ in Peter Zackariasson and Timothy Wilson (eds), *The Video Game Industry: Formation, Present State, and Future* (Routledge 2012) 87.

⁵¹ Martin Campbell-Kelly, *From airline reservations to Sonic the Hedgehog : a history of the software industry* (MIT Press 2003) 273-4.

⁵² Writing in 2000, Lai described cloning as a whole segment of the software industry, comprising those companies engaged in the ‘production of less expensive look-alike and work-alike versions of popular software’: see Lai (n 17) 57.

⁵³ 672 F 2d 607 (7th Cir 1982).

⁵⁴ *Data East USA, Inc v Epyx, Inc*, 862 F 2d 204 (9th Cir 1988).

⁵⁵ [2006] EWHC 24 (Ch), affd [2007] EWCA Civ 219, [2007] ECDR 6.

⁵⁶ *Navitaire, Inc v EasyJet Airline Co* [2004] EWHC 1725 (Ch) (discussed in *Nova Productions* (HC) (n 55) [130]–[134] and *Nova Productions* (CA) (n 55) [45]–[48]). It was perhaps appropriate that the earlier case concerned airline reservation software and was applied in a games case; Campbell-Kelly used airline software and video games as the beginning and the end of his study of the software industry: Campbell-Kelly (n 51).

⁵⁷ *Nova Productions* (CA) (n 55) [55].

the reluctance of UK law to recognise copyright in works such as TV ‘formats’.⁵⁸ A broadly similar decision (regarding software rather than games), summarising the development of the law on non-literal copying and doctrines (especially merger) outside the US, was recently reached by the Court of Appeal in New Zealand.⁵⁹

At the European level, it is clear that a graphical user interface can be protected by copyright but not if it is ‘differentiated only by (its) technical function’ — a significant limitation.⁶⁰ The CJEU’s decision in *SAS Institute Inc v World Programming Ltd*⁶¹ expresses some scepticism regarding the protection of functionality under copyright law; the question arises because interfaces themselves are not protected, but the expression of the interface in computer code could plausibly be.

The most recent detailed treatment of ‘cloning’ by courts requires a return to the United States, and a 2012 district court decision regarding an iPhone app and a very familiar game. In *Tetris Holding LLC v Xio Interactive, Inc*,⁶² Xio argued that it had ‘meticulously copied only non-protected elements’⁶³ — understandable in light of Tetris’s wide range of licensing activities and vigorous defence against infringement. It took legal advice before the launch (not denying that the very purpose was to do something similar to Tetris while staying within the law) and resisted a DMCA takedown notice, which gave rise to the action. In court, it relied upon merger and *scènes à faire*, as well as broader contentions on games, monopoly and patent overlap. However, Tetris prevailed, with the court distinguishing the ‘purely fanciful’ nature of Tetris from the cases on karate and golf (which came with existing rules and assumptions),⁶⁴ proposing that *scènes à faire* was broadly irrelevant because of the lack of stock images, and highlighting how Xio could have used different shapes, movements, dimensions, etc.⁶⁵ It treated the pieces (which Xio called minos, reflecting the (mathematical) tetromino, or what Tetris called tetriminos) akin to the ‘characters’ in the earlier Pac-Man cases.

In our workshop, developers told us how the availability of clones within app stores was a significant source of concern and anger within the industry. However, identifying a suitable legal response was more difficult. We noted clear hostility to extending legal protection against cloning — perhaps influenced by the suspicion of the damage that the use and abuse of patents is said to have done in some fields (eg, mobile phone hardware) and how its application to software was resisted by many, especially in Europe. As one participant told

⁵⁸ *Green v Broadcasting Corp of New Zealand* [1989] UKPC 26 (PC). See further Sukhpreet Singh, ‘The Protection of Television Formats: Intellectual Property and Market-Based Strategies’ (PhD thesis, Bournemouth University 2010).

⁵⁹ *Karum Group LLC v Fisher and Paykel Financial Services* [2014] 3 NZLR 421. For discussion of the close links between older US authorities (for example, the abstraction-filtration-comparison test in *Computer Associates v Altai*, 982 F 2d 693 (2d Cir 1992)) and recent CJEU, UK and New Zealand decisions, and an argument that non-literal copying is as a result rarely found, see Ken Moon, ‘Another Nail in the Coffin for Non-literal Software Copyright Infringement?’ (2015) 10(12) *Journal of Intellectual Property Law & Practice* 921. Moon also suggests (at 926) that TRIPS (n 6) has been a factor in redirecting UK and New Zealand law towards a narrower approach to whether given elements of software are capable of copyright protection.

⁶⁰ Case C-393/09 *Bezpečnostní softwarová asociace — Svaz softwarové ochrany v Ministerstvo kultury* [2010] OJ C63/8. See also Stokes (n 18) 111 (in general); Janssens (n 12) [5.15] (suggesting that this equated to the US ‘merger doctrine’); Moon (n 59) 926 (describing the CJEU’s approach as merger-like but underpinned by originality rather than the idea/expression dichotomy).

⁶¹ Case C-406/10 *SAS Institute Inc v World Programming Ltd* [2012] OJ C 174/5.

⁶² 863 F Supp 2d 394 (D NJ 2012).

⁶³ *ibid* 396.

⁶⁴ *ibid* 408.

⁶⁵ *ibid* 411.

us, ‘The idea of a legal institute outside of videogames to decide whether something is too close to something or not sounds awful’.⁶⁶

Indeed, the courts that have dealt with cases of this nature have had to face a number of challenges. In *Data East USA, Inc v Epyx, Inc*, the judges did not play the game, although they had access to screenshots.⁶⁷ In *Nova Productions*, the judge at first instance played the games and saw videos; screenshots were reproduced in an annex to the decision.⁶⁸ In *Tetris*, the record shows that the judge relied on YouTube videos of gameplay, along with screenshots and written material.⁶⁹ Interesting and contestable assumptions are also made about player behaviour. Most alarmingly, the court in *Atari, Inc v North American Philips Consumer Electronics Corp* held that video games, ‘unlike an artist’s painting or even other audiovisual works, appeal to an audience that is fairly indiscriminating insofar as their concern about more subtle differences in artistic expression’.⁷⁰

III. CRITICAL PERSPECTIVES

A number of authors specifically address the distinctive features of the games industry in relation to intellectual property. Notably, reviewing such work highlights concerns of ‘underprotection’ as well as ‘overprotection’. For instance, inadequacies of the current framework are highlighted in Lee’s work, where she tentatively suggests that ‘gameplay’ should be protected against copying,⁷¹ which despite its importance to the identity and experience of games, is one of the less well-protected aspects of the game under IP law. On the other hand, Booton and MacCulloch criticise the use of TPMs (including DRM) in the game sector. Although TPMs are justified by the industry as an anti-infringement measure, they respond that the way in which they are used (with judicial approval) constituted the protection of dominant business models in the form of a de facto ‘console manufacturers’ right’.⁷² They contend that manufacturers were never the intended beneficiaries of the TPM provisions of copyright law. The dependence of manufacturers on royalty income from developers has been noted by others,⁷³ as has how TPMs support the business model of one-off, relatively high charges for games,⁷⁴ and the mutual dependence between developers and manufacturers in the console sector.⁷⁵ One might therefore think that the emergence of new platforms for gaming presents an opportunity,⁷⁶ although the control exercised by some new players (Apple in particular) is not without its own problems.⁷⁷

⁶⁶ Phillips (n 3).

⁶⁷ See *Data East* (n 54).

⁶⁸ See *Nova Productions* (HC) (n 55).

⁶⁹ See *Tetris* (n 62).

⁷⁰ *Atari, Inc v North American Philips Consumer Electronics Corp* (n 53) [44].

⁷¹ Yin Harn Lee, ‘Play Again? Revisiting the Case for Copyright Protection of Gameplay in Videogames’ (2012) 34(12) *European Intellectual Property Review* 865, 872–3.

⁷² Booton and MacCulloch (n 19) 168, 186–7.

⁷³ Christian Reimsbach-Kounatze and Sacha Wunsch-Vincent, ‘Online Games and Virtual Worlds: Business and Policy Developments’ in Christoph Beat Graber and Mira Burri-Nenova (eds), *Governance of Digital Game Environments and Cultural Diversity: Transdisciplinary Enquiries* (Edward Elgar 2010) 20; Nabyla Daidj and Thierry Isckia, ‘Entering the Economic Models of Game Console Manufacturers’ (2009) 73(1) *Communications & Strategies* 23.

⁷⁴ Nicholas Lovell, *The Curve: Turning Followers Into Superfans* (Revised edn, Penguin 2014) 7.

⁷⁵ Peter Zackariasson and Timothy Wilson, ‘Marketing of video games’ in Peter Zackariasson and Timothy Wilson (eds), *The video game industry: formation, present state, and future* (Routledge 2012) 63.

⁷⁶ Randy Nichols, *The video game business* (BFI 2014) 96–100.

⁷⁷ Daithí Mac Sithigh, ‘App Law Within: Rights and Regulation in the Smartphone Age’ (2013) 21(2) *International Journal of Law and Information Technology* 154; Ronan de Kervenoael, Mark Palmer and Alan Hallsworth, ‘From the Outside In: Consumer Anti-choice and Policy Implications in the Mobile Gaming Market’ (2013) 37 *Telecommunications Policy* 439.

A second theme in academic literature is the relationship between the developer/provider of a game and the user, with a particular focus on the role of copyright (and other legal doctrines) in framing and underpinning this relationship. For instance, copyright is one of the doctrines that require or justify the end user license agreement, and provides a structure for control and ownership in relation to in-world creativity. Yet user rights can often be marginal; Roquilly's study found that 85 per cent of major virtual worlds protect the manager's right to delete content (including user-produced content) at any time without reason, although there was more diversity on whether users could own certain creations.⁷⁸ Moreover, current EU law is unclear on whether certain contractual restrictions (for instance, those restricting freedom of expression) are lawful.⁷⁹ Clarke argues that Sony, as the 'makers' of the former online game *Star Wars Galaxies*, performed three functions: worldmakers, curators and 'toykeepers'. Although Clarke's concerns are not legal, 'respecting the rules of intellectual property ownership' is cited under the third heading, and indeed the first two functions carry legally salient meanings of regulation and the exercise of discretion. He also compares the approach taken in respect of *Star Wars Galaxies* (by Sony) with what he terms 'notoriously litigious IP owners' who crack down on unauthorised or unforeseen uses.⁸⁰

Even this brief account demonstrates that the question is more complex than one of 'high' and 'low' protection. Instead, the more interesting questions are those of alignment between the *level* of protection and the *impact* of protecting specific things. In my own work in 2014, I suggested that the growing significance of consumer law within the games sector, coupled with the uneven impact of intellectual property law, meant that there was no clear relationship between (perceived) needs for protection and the strength of available legal remedies.⁸¹ For instance, players are gaining new and often very powerful legal remedies based on the conventional concepts of consumer law (as they are adapted for digital content), but have very little recourse against a developer, especially in relation to their own in-world creations. Developers have little hope of addressing certain cloning issues and struggle to gain access to some platforms, but can in theory benefit from strong protection against consumer infringement (copying, downloading, etc).

IV. PLAYER SURVEY

We also carried out an online survey, directed at gamers,⁸² which received 246 responses. Participants were invited to make recommendations on changes to 'the way copyright operates in relation to the video game industry'. These are not intended to be statistically significant or representative, but to highlight game-specific perceptions of IP law, and are used in this chapter as one type of evidence in support of the major models outlined in Part V.

By far, the most common recommendation related to DRM. Comments included:

- 1) Many DRM/copy protection systems unfairly penalize ordinary users in the hope of inconveniencing hardcore software pirates (light gamer, male, 26–35, Europe).

⁷⁸ Christophe Roquilly, 'Control Over Virtual Worlds by Game Companies: Issues and Recommendations' (2011) 35(3) MIS Quarterly 653.

⁷⁹ Guibault (n 26) 532.

⁸⁰ M J Clarke, 'Branded Worlds and Contracting Galaxies: The Case of Star Wars Galaxies' (2014) 9(3) Games and Culture 203.

⁸¹ Daithí Mac Síthigh, 'Multiplayer Games: Tax, Copyright, Consumers and the Video Game Industries' (2014) 5(3) European Journal of Law and Technology.

⁸² Circulated through discussion boards, mailing lists and on social media.

- 2) Remove DRM, as they only punish people trying to buy a game (heavy gamer, male, 18–25, North America).
- 3) DRM hurts the experience of gamers who purchase their games legitimately. It should be abolished entirely (light gamer, male, 18–25, North America).
- 4) Quit making bad DRM. I understand and respect companies trying to make a profit, but bad DRM has screwed my system up before. Use Steam as an example of effective DRM (moderate gamer, female, 36–45, North America).
- 5) DRM needs to be handled with care in order to ensure fairness. Allowing limited sharing (ie, 1 game = 2 or 3 simultaneous users) might reduce piracy and DRM circumvention. A strategy is needed whereby gamers perceive generosity rather than resent restrictions (moderate gamer, male, 26–35, North America).
- 6) Most of my opinions on copyright are not necessarily restricted to the video game industry. That said, it needs to get away from punishing people who legally pay for their games with all of these punitive DRM mechanisms (heavy gamer, male, 26–35, North America).

A second issue was the related concept of outright ownership. There were calls to ‘stop treating games as immaterial objects — when I’ve bought a game, I want to be able to continue to play it’ (heavy gamer, male, 36–45, Europe), and to ‘[give] control back to the customer — if you paid for something, you own it and can do as you please with it’ (moderate gamer, male, 18–25, Europe). Others support used games (moderate gamer, female, 26–35, North America) or more consumer rights (heavy gamer, female, 26–35, Europe) — both issues being familiar in the academic literature discussed in Part III of this chapter.

Views on ‘cloning’ were mixed. While a number of respondents called for greater attention to cloning and better legal remedies for those affected, there was a high level of criticism of ‘word-based’ legal actions (appearing to refer to controversies in trade mark law — for example, ‘candy’ cases).⁸³

V. MODELS

Having reviewed a range of perspectives on games and the law, it becomes apparent that there are a number of broad approaches to the scope of protection and the work that the law is being expected to do. These approaches can be grouped into three ‘models’ or sets of assumptions. Doing so allows for common principles to be identified and the cumulative impact of judicial decisions and industry practices to be appreciated.

A. General

The first model is one that does not attribute special significance to games, and in particular acknowledges that the label ‘game’ is a container for a number of facets of copyright. As far back as 1982, Sugar argued that although imitations would constitute infringement of artistic and musical works, a game should (in policy terms) be treated as a film and the software instructions as a script.⁸⁴ However, the twin-track Software Directive

⁸³ See for example the criticism and open letter discussed in Stuart Dredge, ‘Candy Crush Saga Boss Says Sorry for Cloning, but Defends Trademark Filings’ *The Guardian* (London, 28 January 2014) <<http://www.theguardian.com/technology/2014/jan/28/candy-crush-saga-king-cloning-trademarks>> accessed 5 January 2016.

⁸⁴ Steven Sugar, ‘Legal Protection of Video Games’ (1982) 1 *International Media Law* 22, 22–3.

and Information Society Directive⁸⁵ has meant that, if games are software, then games are potentially different. Today, though, WIPO's research has pointed to a good deal of variation between state approaches to games, and the industry has been able to benefit from both forms of protection. In particular, regulating games under the Information Society Directive has emerged as the preference in the EU, following *PC Box*.⁸⁶ O'Donnell's ethnographic study of game developers emphasised the need to study the industry as comprising more than software alone, especially in light of the move from engineering-led to interdisciplinary working practices, and the significance of providing for a user *experience*.⁸⁷

These points may also lead to a position whereby it is held that a game is acquired in the same fashion as other cultural goods (and services) are.⁸⁸ This might well be the consequence of *UsedSoft*,⁸⁹ although it is perhaps a moving target when it comes to post-sale legal relationships, given changes in more established markets (for example, books as compared with ebooks). Furthermore, the evolving position of 'digital content' under consumer law (for example, as a new third category alongside goods and services in the UK)⁹⁰ should be noted because it attributes a certain distinctiveness to games, not in their own right but alongside other digital content, with consequential changes in emphasis or expectation.

B. Game-specific

A second position is that a game is *sui generis*, akin to software and databases. An illustrative approach is that of Rendas,⁹¹ who criticised the *PC Box*⁹² decision by contending that video game software 'controls the different audiovisual elements and makes it possible for the user to interact with these elements'. As such, he argued, the 'attractiveness and very operation of videogames' depended on the said software.⁹³ Although put in game-specific terms, a link could be drawn between this software-focused account of games and the growing interest in the legal status of computer code and algorithms.⁹⁴ Furthermore, approaches to copyright where the legal position is unclear or favourable (in sectors such as fonts, recipes, comedy and databases in the US) demonstrate both the significance of norms and the practical utility of non-copyright forms of IP protection in providing a partial response to difficulties.⁹⁵ It could however also be argued that the position of some doubters of *UsedSoft* (ie, using *PC Box* to argue that games should be dealt with under the Information

⁸⁵ See Software Directive (n 7); Information Society Directive (n 8).

⁸⁶ *PC Box* (n 21).

⁸⁷ Casey O'Donnell, 'This is not a software industry' in Peter Zackariasson and Timothy Wilson (eds), *The video game industry : formation, present state, and future* (Routledge 2012) 17-22. But compare with Nichols, who points to non-union labour practices being more akin to the computer industry and the dominance of programmers within the labour force: Nichols (n 76) 142, 149.

⁸⁸ In this context, the further comments of Nichols on games and the industrial strategies of their makers being influenced by computer and toy industries, but with the increasing influence of other creative industries (e.g. film and music), are helpful. Nichols (n 76) 1-3.

⁸⁹ *UsedSoft* (n 24).

⁹⁰ Consumer Rights Act 2015 (UK).

⁹¹ Tito Rendas, 'Lex Specialis(sima): Videogames and Technological Protection Measures in EU Copyright Law' (2015) 37(1) *European Intellectual Property Review* 39.

⁹² *PC Box* (n 21).

⁹³ Rendas (n 91) 44.

⁹⁴ See for instance Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press 2015); Stuart Minor Benjamin, 'Algorithms and Speech' (2013) 161(6) *University of Pennsylvania Law Review* 1445.

⁹⁵ Kal Raustiala and Christopher Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation* (Oxford University Press 2012) (not specifically addressing video games).

Society Directive) might also support a game-specific reading of the law because of how they point to the ‘complexity’ of the video game.⁹⁶

These positions also invite a more nuanced response to the phenomenon of cloning, even if agreement is still some distance away. Lee has argued that the concern that protecting gameplay stifles creativity can be addressed through balancing tests.⁹⁷ However, there was little agreement among those we spoke to (at our workshop) on what those tests should be. Scherlis highlights the phenomenon of those who ‘copy innovative games, while changing artwork, text, and titles just enough to avoid infringing copyright law’.⁹⁸ There might well be similarities in other fields (eg, selling unauthorised merchandise or taking advantage of fame and the nature of user behaviour through ‘chart hijacking’⁹⁹). but not to the same extent. Therefore this is emerging as a game-specific problem — which would be much easier solved in a game-focused copyright system (or not, if that were the preference).

One might also wilfully blur the lines between copyright, trade mark and non-harmonized doctrines (eg, passing off) in a sui generis IP or quasi-IP system in order to address cloning and/or for other purposes. This issue took on greater significance at an earlier stage of the development of the software industry, but recent controversies highlight its significance. The initial dilemma was whether copyright or patent law offered the most appropriate protection to software. In the US, major players had limited success in meeting the tests of patent law, but were concerned that the then-applicable requirements of copyright law (deposit of human readable code with the Copyright Office) would destroy competitive advantage.¹⁰⁰ Even then, firms pursued hybrid approaches, such as trade secrets, licensing, and copyright in ancillary materials such as manuals.¹⁰¹ WIPO’s work on model provisions for software were ‘inspired by copyright’ but with some elements of patent law, but were sidelines after the United States incorporated software into copyright law in 1980.¹⁰² Indeed, the approach taken in the International Convention for the Protection of New Varieties of Plants (UPOV)¹⁰³ has much to commend it, because of how the broad principles of patent law were adapted (through, for instance, narrowing the scope of protection). The specific treatment of geographical indications of origin under TRIPS is also interesting, not just because of the choice between the means of protection (also present for plant varieties, where signatories can follow UPOV or use patent law), but also because of the a two-tier approach (which offers specific and stronger protection in respect of wines and spirits),¹⁰⁴ which

⁹⁶ See for instance Savič (n 30) 427. The same author subsequently argues that the *Allposters* decision could, in light of *PC Box*, be a barrier to the resale of games: Maša Savič, ‘The CJEU Allposters case: beginning of the end of digital exhaustion?’ (2015) 37 European Intellectual Property Review 378, 381.

⁹⁷ Lee (n 71) 868.

⁹⁸ Dan Scherlis, ‘Guest Column: Don’t Clone My Indie Game, Bro’ (*Digital Media Wire*, 9 March 2012) <<http://dmwmedia.com/news/2012/03/09/guest-column-dont-clone-my-indie-game-bro>> accessed 5 January 2015, cited in Phillips (n 3).

⁹⁹ Typically, this involves releasing a lawful cover version during the window between the coming to prominence of a song and the release of the official version for download or streaming, in the expectation that users will search for the song and download whatever version is available. See for example Andy Malt, ‘Stop me if you’ve heard this one before’ (*Complete Music Update*, 6 July 2012) <<http://www.thecmuwebsite.com/article/editors-letter-stop-me-if-youve-heard-this-one-before/>> accessed 21 March 2016; Shawn Setaro, ‘Soundalike Songs Are a Two-Faced Business’ (*Cuepoint*, 5 March 2015) <<https://medium.com/cuepoint/soundalike-songs-are-a-two-faced-business-f44ca9678bef#.k2kswwc2b>> accessed 21 March 2016.

¹⁰⁰ Campbell-Kelly (n 51) 107.

¹⁰¹ Ibid 108.

¹⁰² Bing (n 37) 401-402.

¹⁰³ International Convention for the Protection of New Varieties of Plants (Paris, 2 December 1961) 815 UNTS 89, entered into force 10 August 1968, as revised at Geneva on 19 March 1991.

¹⁰⁴ TRIPS (n 6) art 22. See further G E Evans and Michael Blakeney, ‘The Protection of Geographical Indications After Doha: Quo Vadis?’ (2006) 9(3) Journal of International Economic Law 575.

recognises the advantages of a pragmatic approach. Of course, any regime for games would need to be adapted to the specific features of the sector.

Even in the absence of a *sui generis* approach, tensions can be identified in how models and metaphors are chosen. In relation to games, particular flashpoints are around the application of the merger and *scènes à faire* doctrines. Moon argues that the tests used by courts (for merger in particular) are not capable of application to software because of the functional nature of software.¹⁰⁵ In *Navitaire*, the idea of using the ‘plot of a novel’ as a relevant comparator was greatly criticised;¹⁰⁶ this point was quoted at length in *Nova Productions* in the High Court, and approved (albeit the subject of a brief interlude on chefs and recipes) in the Court of Appeal.¹⁰⁷ (This was however still an important theme in our discussions with developers, who feared that a strong legal approach would lead to the commodification or monopolization of genre.¹⁰⁸) In the earlier US cases on arcade games, courts grappled with how to apply established precedents (notably a piece of jewellery — a pin — in the shape of a bee¹⁰⁹), finding relevance but less obviousness for games.¹¹⁰ In the more recent *Tetris* decision,¹¹¹ the Court drew heavily on cases and arguments regarding board games. Of course, the *PC Box* decision saw manufacturers play up the non-software aspects of games in order to ensure protection of their business model through the application of TPM law.¹¹²

C. Player rights

I contend that there is also a player-focused account of copyright, which is less concerned with the status of the game and more exercised regarding the instrumental use of copyright in support of particular business and organizational models. The game is not just a work but also provides an infrastructure for subsequent creativity, transactions and exchanges.

The freemium business model (offering the game for free and charging for additional features through in-game or in-app purchases) is compelling for some but it has highlighted a significant, non-copyright area of legal relationships between developers and users.¹¹³ For example, the Office of Fair Trading began a project on ‘Children’s Online Games’ in 2013,¹¹⁴ resulting in a final set of ‘principles for online and app-based games’¹¹⁵ which explained the

¹⁰⁵ Moon (n 59) 930.

¹⁰⁶ *Navitaire* (n 56) [94].

¹⁰⁷ *Nova Productions* (CA) (n 55) [47]–[50].

¹⁰⁸ Phillips (n 3) 147.

¹⁰⁹ *Herbert Rosenthal Jewellery Corp v Kalpakian*, 446 F 2d 738 (9th Cir 1971).

¹¹⁰ *Atari, Inc v North American Philips Consumer Electronics Corp* (n 53) 616–17; *Atari, Inc v Amusement World, Inc* (n 20) 228.

¹¹¹ *Tetris* (n 62).

¹¹² See *PC Box* (n 21).

¹¹³ I have discussed this point in more detail in Mac Síthigh, ‘Multiplayer Games’ (n 81) and in a chapter in Lilian Edwards (ed), *Law, Policy and the Internet* (Hart 2016) (forthcoming).

¹¹⁴ Office of Fair Trading, ‘Children’s Online Games: Report and Consultation’ (Report, OFT1506, Office of Fair Trading 2013) <<https://assets.digital.cabinet-office.gov.uk/media/53330c4de5274a5660000005/oft1506.pdf>> accessed 6 January 2015.

¹¹⁵ Office of Fair Trading, ‘The OFT’s Principles for Online and App-based Games’ (OFT1519, Office of Fair Trading 2014) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/288360/oft1519.pdf> accessed 6 January 2015.

application of the Unfair Commercial Practices Directive¹¹⁶ to these games. In 2013, national consumer protection authorities in the European Union, acting through the Consumer Protection Cooperation ('CPC') network,¹¹⁷ reached a common position on EU law and in-app purchases in 'games apps'.¹¹⁸

The relationship between platform and player is acknowledged as contractual in nature (with an inherent inequality of bargaining power). The *PC Box* decision would be criticized under this approach on the grounds that its distinction between fundamental rights and user rights is unsound. In the US (games) decision of *MDY Industries*,¹¹⁹ limits were placed on the use of copyright law to achieve other goals. In the EU, national reviews of copyright law have also pointed to the need to avoid allowing the statutory rights of users to be overridden by 'agreement' between a user and a platform.¹²⁰ This is already the case for certain rights, such as the exception for decompiling contained in article 8 of the Software Directive and in similar provisions elsewhere.¹²¹

A player rights model of game copyright law also entails significant reservations on the use of DRM. A very limited form of this is seen in the new provisions of the Consumer Rights Directive,¹²² which require disclosure of limits to functionality (including TPMs) and interoperability; Guibault proposed (before the Directive) that this could form one part of a consumer law strategy to counter the over-use of contractual restrictions, but only alongside substantive protections and/or changes to the doctrine of contract law itself.¹²³ In Australia, consumer protection authorities participated as a friend of the court in the *Sony v Stevens* DRM case.¹²⁴ Developments of this nature illustrate how a response outside of copyright law is a part of the evolving status of games.

VI. CONCLUSION

The evidence presented in this chapter, and the attempt to summarize a broad range of perspectives in the three models set out immediately above, does not present a complete picture of the legal issues in the games sector. Nonetheless, it has been shown that as a result of the lack of clarity regarding the role that copyright plays in respect of games, unpacking cases and critical perspectives can demonstrate the significance of certain assumptions and definitions.

¹¹⁶ Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive') [2005] OJ L149/22.

¹¹⁷ See Council Regulation (EC) 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) [2004] OJ L364/1.

¹¹⁸ CPC Network, 'Assessment of proposals made by Apple, Google and relevant trade associations regarding in-app purchases in online games' (July 2014) <http://ec.europa.eu/consumers/enforcement/cross-border_enforcement_cooperation/docs/20140718_in-app_cpc_common-position_en.pdf> accessed 23 March 2016. The CPC's four points were that 'free' games should not mislead consumers as to costs; that there should be no direct exhortations to children; that payment information should be provided and charges be the subject of explicit consent; and that a contact email address should be made available.

¹¹⁹ *MDY Industries* (n 27).

¹²⁰ See for example the recommended changes to ss 2(10) and 374 of the Copyright and Related Rights Act 2000 (Ireland) in Copyright Review Committee (Ireland), 'Modernising copyright' (Department of Jobs, Enterprise and Innovation 2013) <<https://www.djei.ie/en/Publications/Publication-files/CRC-Report.pdf>> accessed 21 March 2016.

¹²¹ See for instance the Copyright Act 1994 (NZ) s 80D, as discussed in Ian Finch (ed), *James and Wells Intellectual Property Law in New Zealand* (2nd edn, Thomson Reuters 2012) 320.

¹²² Directive 2011/83/EU of 25 October 2011 on consumer rights [2011] OJ L304/64.

¹²³ Guibault (n 26) 534-6.

¹²⁴ *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2003) 200 ALR 96; David Harvey, *Internet.law.nz: Selected Issues* (3rd edn, LexisNexis 2011) 798.

I do not mean to suggest that arguably arcane doctrinal disputes would seize the attention of lawmakers. However, copyright legislation drafted anew in respect of the second and third model could look rather different to what is currently in place. Moreover, even the first model is an interpretation of and a particular approach to current legislation, rather than a mere encapsulation of the status quo. The difficulty for any imagined lawmaker responding to the ‘needs’ of the games sector is that the economic and cultural interests of different groups would be affected by the choice of one path or another. Put simply, aspects of business models and commercial strategies in the games industries are built around understandings of what the law does (and does not) protect. The intention of this author, and indeed one of the goals of our broader project, has been to identify these relationships in more explicit terms.